United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,664

GODFREY P. SCHMIDT,

Appellant,

v.

LAWRENCE T. SMITH,
GLENS FALLS INSURANCE COMPANY,

Appellees.

Appeal From the United States District Court
for the District of Columbia

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CORNELIUS H. DOHERTY
1010 Vermont Avenue, N.W.
Washington, D. C.

Attorney for Appellant

QUESTION PRESENTED

Did the trial Court err in dismissing a motion for judgment for damages for the wrongful suing out of attachment before judgment brought in the original attachment proceeding on the ground that the Court did not have jurisdiction of the matter in that cause and that such an action should be brought in an independent action?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Godfrey P. Schmidt from a dismissal of his motion for judgment for damages for a wrongful attachment on the ground that the trial Court, in the case of Lawrence T. Smith v. Godfrey P. Schmidt, Civil Action No. 92-61, did not have jurisdiction of the action in that cause.

In the original action in the trial Court, Lawrence T. Smith was the plaintiff, Godfrey P. Schmidt was the defendant and Glens Falls Insurance Company was the surety on the attachment bond, and the parties will be hereafter referred to as they appeared originally in the trial Court.

On January 9, 1961, plaintiff filed a complaint against defendant, a non-resident of the District of Columbia, for services rendered by

him in the law office of defendant in the sum of $12,598.26. Plaintiff had an attachment before judgment issued with Glens Falls Insurance Company as surety (J.A. 1-3).

Judgment was entered in favor of defendant and after the time for an appeal had elapsed defendant, on March 24, 1964, filed in the original cause, C.A. No. 92-61, a motion for judgment for damages sustained by reason of the wrongful attachment and plaintiff and surety made parties thereto. Plaintiff and surety filed opposition to the motion on the ground that the Court did not have jurisdiction in that cause to hear the action (J.A. 8-11).

The opposition was sustained by the Court and the motion for judgment was dismissed on May 25, 1964 (J.A. 14).

STATEMENT OF THE CASE

On January 9, 1961, plaintiff, a resident of the City of New York, filed a complaint against defendant for judgment for $12,598.26 for services performed by him in the law office of defendant. Plaintiff had an attachment before judgment issued with Glens Falls Insurance Company as surety, attaching $12,598.26, belonging to defendant, in the hands of the International Teamsters Union. A trial was had and on January 13, 1964, judgment was entered in favor of the defendant. No appeal having been taken defendant, on March 24, 1964, filed, in the same cause, C. A. No. 92-61, a motion for judgment against plaintiff and surety (J.A. 8-9).

Motions were filed by plaintiff and surety to dismiss the motion for judgment on the ground, among other reasons not necessary to this appeal, that the motion was an action for damages and constituted an independent action which should be brought as an independent action, and that the trial Court did not have jurisdiction to enter judgment against plaintiff and surety in that cause (J.A. 10-12).

The Court, upon a hearing of the motions, dismissed the motion for judgment filed by defendant and he appeals from the judgment of dismissal.

STATEMENT OF POINTS

1. The Court erred in dismissing defendant's motion for judgment.

2. The Court erred in holding that Sections 2402 and 2403 of Title 28 of the 1961 Edition of the District of Columbia Code were not applicable to actions on attachment bonds.

SUMMARY OF ARGUMENT

Sections 2402 and 2403 of Title 28 of the 1961 Edition of the District of Columbia Code definitely give to defendant the right to proceed in the same cause against the plaintiff and his surety for damages sustained by reason of the wrongful suing out of the attachment, and the trial Court erred in entering a judgment dismissing the motion for judgment for damages.

ARGUMENT

The Trial Court Had Jurisdiction of This Action

Plaintiff, a non-resident of the District of Columbia, filed an action against defendant, a non-resident of the District of Columbia, claiming $12,598.26 due him for services performed in defendant's office in New York from 1954 to June 30, 1959, and, in accordance with Section 301 of Title 28 of the 1961 Edition of the District of Columbia Code, an attachment was issued attaching funds of the defendant in the District of Columbia in that amount. The attachment bond required by this section was given by the surety herein. A judgment for defendant was entered in that cause on January 13, 1964.

Defendant filed in that cause a motion for judgment against plaintiff and surety for damages sustained by him by reason of the wrongful attachment. The motion of the plaintiff and surety to dismiss was granted without prejudice to defendant's right to renew his claim in an independent action.

The Court, in its memorandum, refers to the fact that surety was served under authority of Rule 73 (f) of the Federal Rules of Civil Procedure. The record will disclose that the surety was also served in the proper manner of a party to an action and it is the understanding of counsel for defendant that surety is not contending a lack of service but merely that defendant's cause of action should be brought in a separate action.

It is true that 16-301 does not, in so many words, say that an action for damages for a wrongful attachment can or cannot be brought in the same action. That section does say that in order to obtain such an attachment plaintiff shall first file in the Clerk's Office a bond, executed by himself or his agent, with security to be approved by the Clerk, in twice the amount of his claim, conditioned to make good to the defendant all costs and damages which he may sustain by reason of the wrongful suing out of the attachment. There is nothing in the section which covers the procedure for a recovery on the bond or undertaking.

There is a general statute which covers the proper mode of procedure on all bonds and undertakings and that is Chapter 24 of Title 28 of the 1961 Edition of the District of Columbia Code. This Chapter has seven sections with the following general heading:

"BONDS AND UNDERTAKINGS"

Section 2401 defines a bond. Section 2402 is as follows:

> "An undertaking shall be understood to signify an agreement entered into by a party to a suit or proceeding, with or without sureties, upon which a judgment or decree may be rendered in the same suit or proceeding against said party and his sureties, if any, the said party and sureties submitting themselves to the jurisdiction of the court for that purpose. (Mar. 3, 1901, 31 Stat. 1265, ch. 854, § 479.)"

The pertinent parts of Section 2403 are as follows:

> "In all cases * * * where a bond is required from any party to a cause or proceeding pending in such court, such bond shall be in the form of an undertaking, under

seal, in a maximum amount to be fixed by the court, conditioned as required by law, the surety or sureties therein submitting themselves to the jurisdiction of the court and undertaking for themselves and each of them, their and each of their heirs, executors, administrators, successors, and assigns to abide by and perform the judgment or decree of the court in the premises, and further agreeing that, upon default by the principal in any of the conditions thereof, the damages may be ascertained in such manner as the court shall direct; that **the court may give judgment thereon in favor of any person thereby aggrieved against such principal and sureties for the damages suffered or sustained by such aggrieved party, and that such judgment may be rendered in said cause or proceeding against all or any of the parties whose names are thereto signed.**

"And the said United States District Court for the District of Columbia and its respective special terms, be, and they are hereby, vested with and given jurisdiction and authority to enter such judgments and decrees against the principal and surety or sureties, or any of them, upon such undertaking as law and justice shall require: Provided, **that nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.**" (Emphasis supplied.)

The Court, in its memorandum, refers to the case of Tri-State Motor Corp. v. Standard Steel Car Co., 51 App. D.C. 109 (1922), 276 F. 631, as supporting its action in dismissing the motion (J.A. 13).

In that case a motion was made to dissolve an attachment which was issued by authority of Section 445 of the then 1910 Annotated Code for the District of Columbia (now Section 301, Title 16) because of its conflict with Section 479 A which was added to the Code by the Act of Congress of April 19, 1920, 41 Stat. 564. The only question presented to the Court in that case was whether the bond was void under the theory that the later

enactment repealed the prior one or that there was an irreconcilable conflict between them.

This Court referred to the case of the United States v. Chase, 135 U.S. 255, 260, 10 S. Ct. 756, 757, as giving the answer and citing from that case the following:

> "It is an old and familiar rule that, 'where there is in the same statute, a particular enactment, and also a general one, which in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' * * * This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include."

The Court did not have before it the question of procedure permitted in an action on a bond or undertaking such as we have here. In Section 301, Title 16, there is only the reference to the requirements to obtain an attachment before judgment. It leaves wide open the question of procedure in an action on the bond for a wrongful attachment. Sections 2402 and 2403 of Title 28 cover the procedure in all cases. Both of these actions are most definite that in giving the bond or undertaking required by the statute in any proceeding the parties submit themselves to the jurisdiction of the Court to enter such judgments and decrees against them as law and justice shall require.

It must be assumed that these sections referred to recovery on attachment bonds for it does state that the bond is for the purpose of making good to the defendant all costs and damages he may sustain by reason of the wrongful suing out of the attachment.

The record in this case discloses that there was a trial of the issues raised by plaintiff's complaint and his affidavit that certain sums were due and owing and that there was a finding and judgment in favor of the defend-

ant on those issues. The United States Court of Appeals for this Circuit, in its opinion in the case of Davis v. Peerless Insurance Company, 103 U.S. App. D.C. 125, 255 F.2d 534, at page 128, made the following statement:

> "That Stein's failure of success resulted in a 'wrongful suing out of the attachment,' as the term is used in our Code is not to be doubted. This result is not only recognized in practice over the years in the District of Columbia, but Stein's case was fully tried on the merits with judgment adverse to the claims of the plaintiff-in-attachment. The Court concluded that the contract and note in suit were illegal and contrary to public policy That judgment established the wrongfulness of Stein's deprivation to Davis of the full use and enjoyment of his property under the attachment, and even expressly reserved to Davis the right to pursue his remedy on the attachment bond."

The Court, further in its opinion, discussed the matter of damages and at page 129 made the following statement:

> "He is limited to, and the surety is bound only to pay, such costs and damages as Davis can show were sustained because of the detention of his property. Perhaps his itemized list of damages exhibited to the appellee already includes loss of business use of the vehicles, loss of profits, depreciation, and the like. Perhaps he has shown a basis for a claim for attorney fees for procuring the return of the vehicles or of personal expenses attributable to the attachment."

It would be most fair to assume that Sections 2402 and 2403 of Title 28 were intended to protect the defendant in the attachment proceedings. It would also be most fair to assume that it was intended that in the event of a wrongful attachment the defendant would not have to travel all over the country to find the plaintiff who had caused the damage in order to serve process upon him so that he, and his surety, would be required to pay such damages as were permitted by law. The only logical method of

protecting the defendant would be to have the matter heard in the same cause where all parties were available and which is in accord with Sections 2402 and 2403.

CONCLUSION

It is respectfully submitted that the trial Court was in error in dismissing defendant's motion for judgment and that the judgment of the United States District Court for the District of Columbia should be reversed with directions to reinstate defendant's motion for judgment.

Respectfully submitted,

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N.W.
Washington, D. C.
Attorney for Appellant

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JOINT APPENDIX

[Filed January 24, 1961]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWRENCE T. SMITH
2021 Hillyer Place, N.W.
Washington, D. C.
Plaintiff

v.

GODFREY P. SCHMIDT
9 Bayeau Road
New Rochelle, New York
Defendant

Civil Action No 92-61

AMENDED COMPLAINT FOR SERVICES PERFORMED

Comes now the plaintiff and as of course in accordance with Rule 15 (a), Federal Rules of Civil Procedure, amends the complaint in this action so that the same will read as follows, to wit:

1. In or about May, 1954, Plaintiff, an attorney licensed to practice in the State of New York, entered into an agreement with Defendant, also an attorney licensed to practice in the State of New York, to perform professional services in the law offices maintained by Defendant in New York City.

2. Pursuant to said agreement, Plaintiff duly performed said services thenceforth until on or about June 30, 1959.

3. For the performance of said services, Defendant became indebted to Plaintiff in the amount of $29,198.02, of which $12,598.26 remains due and unpaid.

WHEREFORE, Plaintiff demands judgment against Defendant in the sum of $12,598.26, plus interest thereon at 6% per annum from and after June 30, 1959, plus the costs of this proceedings.

/s/ Lawrence T. Smith
Plaintiff

/s/ Seymour J. Spelman
Attorney for Plaintiff
c/o Wasserman & Carliner
902 Warner Building
Washington, D. C.

[Filed January 17, 1961]

NOTICE

To International Brotherhood of Teamsters, Garnishee:

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse to do so, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

INTERROGATORIES

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to the defendant? If so, how, and in what amount?

ANSWER: By order entered January 13, 1961, in the case of John Cunningham, et al. v. John F. English, et al., Civil Action No. 2361-57, The Honorable F. Dickinson Letts reinstated an award (first made on July 16, 1958 and later vacated by the Court of Appeals on June 12, 1959 in International Brotherhood of Teamsters.

2d. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?

ANSWER: No. cont'd -- et al v. Dodd, et al., No. 14,733; later reinstated on December 9, 1959 and subsequently reversed by the Court of Appeals June 13, 1960 in International Brotherhood of Teamsters, et al. v Godfrey P. Schmidt, et al., 282 F. 2d 837) of $105,000.00 to Godfrey P. Schmidt and an equal amount jointly to two others. By agreement of all parties concerned, the amount due and owing has been reduced to $95,000.00 to Mr. Schmidt and a like amount jointly to the others and the time of payment has been deferred.

No. 2: Other than as set forth above, we neither had at the time of service nor do we now have any other property in our possession belonging to or credited to the defendant.

/s/ John F. English
General Secretary-Treasurer

[Jurat, dated 1-17-61]

[Filed January 9, 1961]

BOND IN ATTACHMENT

Know all men by these Presents, That we I, Lawrence T. Smith, as principal, and Glen Falls Insurance Company, as surety, are held and firmly bound unto the above-named Godfrey P. Schmidt in the full sum of twenty-five thousand one hundred ninety-six & 52/100 (25,196.52) dollars to be paid to the said Godfrey P. Schmidt, his executors, administrators, successors, or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents. Sealed with our seals, and dated this 9th day of January, in the year of our Lord one thousand nine hundred and sixty one.

Whereas, The above-named Lawrence T. Smith has sued out a Writ of Attachment against the lands and tenements, goods, chattels, and credits of the said defendant found in the District of Columbia.

Now, therefore, the condition of this obligation is such, That if the above-named Lawrence T. Smith shall make good to the said defendant all costs and damages which he may sustain by reason of the wrongful suing out of said Attachment, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Sealed and delivered in the presence of

/s/ Lawrence T. Smith

Glens Falls Insurance Company
by /s/ Joseph H. Robison, Attorney-in-Fact

Surety approved the 9th day of January, 19 61

HARRY M. HULL, Clerk

By /s/ Robert E. Huey
Deputy Clerk

[Filed March 20, 1961]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant, Godfrey P. Schmidt, by and through his attorney, Cornelius H. Doherty, and for answer to the amended complaint filed herein submits the following:

1. The defendant avers that the action of the plaintiff, if any, is barred by the Statute of Limitations in force and effect in the District of Columbia.

2. The defendant admits that the plaintiff was employed as an attorney in his office and avers that the plaintiff was paid the salary which had been agreed upon.

3. The defendant denies that he is indebted to the plaintiff in the sum of Twelve Thousand Five Hundred Ninety-Eight Dollars and Twenty-Six Cents ($12,598.26), or in any sum.

The premises considered, the defendant prays that the said amended complaint be dismissed with costs.

/s/ Cornelius H. Doherty

1010 Vermont Avenue, N.W.
Washington, D. C.
Attorney for Defendant

[Filed June 1, 1964]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.
Tuesday, December 17, 1963

The above-entitled matter came on for trial before the HONORABLE EDWARD A. TAMM, United States District Judge, at 10:00 a.m.

* * *

2

LAWRENCE T. SMITH

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SPELMAN:

Q. Would you please state your name? A. Lawrence T. Smith, L-a-w-r-e-n-c-e.

Q. Where do you live, Mr. Smith? A. 81 Park Terrace West, New York 34, New York.

Q. And what is your occupation, sir? A. I am an attorney.

Q. And when did you become admitted to practice as an attorney?

A. In 1952.

Q. In what state? A. New York.

* * *

3 [Certificate of Court Reporter]

[Filed January 13, 1964]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial on December 17, 1963, upon the amended complaint filed herein by plaintiff, Lawrence T. Smith, the answer of the defendant, Godfrey P. Schmidt, the pre-trial order of November 13, 1963, the order of this Court dated December 13, 1963, permitting plaintiff to amend his claim to assert a claim on a quantum meruit basis, the testimony taken in open Court, and having been duly argued and considered, the Court, this 13th day of January, 1964, makes the following

FINDINGS OF FACT

1. That plaintiff and defendant are members of the Bar of the State of New York, and that plaintiff was employed in defendant's law office in the City of New York during the period from 1952 through July 12, 1959.

2. That commencing around June 1, 1954, the records of plaintiff and defendant would indicate that plaintiff's salary was approximately Eighty-Four ($84.00) Dollars a week, which continued throughout the entire period of his employment and that occasionally the defendant would be in arrears in the payment of the amount to plaintiff.

3. That on July 12, 1959, when plaintiff severed his connection with defendant, there was admittedly some amount owing to plaintiff.

4. That on or about August 17, 1959, a check in the approximate sum of Eighteen Thousand ($18,000.00) Dollars, payable to the defendant from the Teamsters Union, was delivered to plaintiff, and plaintiff refused to deliver the check to the defendant until the amount due him was paid, and on that day the plaintiff was paid Fifty-Five Hundred ($5500.00) Dollars, and the check for Eighteen Thousand ($18,000.00) Dollars was delivered to the defendant and placed in his bank account.

5. That on August 4, 1960, plaintiff wrote defendant in which he referred to an error in the Form 1099 filed by the defendant with the Internal Reve-

nue Service for the year 1959 in which the Fifty-Five Hundred ($5500.00) Dollars was referred to, but nothing said about any monies due plaintiff from the defendant. In this letter plaintiff referred to certain records that he had which would help to clear this record.

6. That on October 25, 1960, a letter was written by the plaintiff to the defendant demanding payment of monies owed to him.

7. That no record of any kind was produced to sustain plaintiff's claim that there was a written agreement between he and the defendant dated around June 1, 1954, by which he was to receive One Hundred ($100.00) Dollars a week starting June 1, 1954, out of which Sixteen ($16.00) Dollars each week was to go toward the payment of a loan made by plaintiff to the defendant; that commencing June 1, 1955, plaintiff was to receive an increase of twenty (20%) per cent on this salary and thereafter fifteen (15%) per cent increase each year. Plaintiff testified that defendant signed the agreement and a copy of the agreement given to him, which he lost, but plaintiff, in his deposition of May 17, 1961, on page 8, stated that it was his recollection that the defendant signed the agreement.

8. That plaintiff testified to persons who might have been present when the written agreement was signed, but no apparent effort was made by plaintiff to produce any witness or witnesses, even though approximately three (3) years had elapsed since the filing of his action against the defendant.

9. The defendant denied that there was any such agreement, written or otherwise, on or about June 1, 1954, or at any time, as asserted by plaintiff and that plaintiff's salary from June 1, 1954, to and including July 12, 1959, was approximately Forty-Two Hundred ($4200.00) Dollars a year, with an occasional small bonus, which fact was borne out by the records of both plaintiff and defendant which were filed with the Internal Revenue. The defendant also denied that plaintiff did any substantial legal work on his behalf and that the Fifty-Five Hundred ($5500.00) Dollars paid to plaintiff on August 17, 1959, was in full payment and settlement of all monies due and payable to the plaintiff by the defendant.

Upon the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

1. That the plaintiff, Lawrence T. Smith, has failed to prove the existence of any agreement, written or oral, existing between plaintiff and defendant executed around May 28, 1954, effective June 1, 1954.

2. That plaintiff has failed to prove that there are any monies due him on a quantum meruit basis for services performed by him on defendant's behalf.

3. That the Fifty-Five Hundred ($5500.00) Dollars paid to plaintiff by the defendant on August 17, 1959, was in full payment of any and all monies due plaintiff.

4. That plaintiff has failed to sustain the burden of proving his claim by a preponderance of the evidence and that defendant is entitled to judgment.

/s/ Edward A. Tamm
Judge

[Certificate of Service]

[Filed January 13, 1964]

ORDER FOR JUDGMENT

This cause came on to be heard upon the Findings of Fact and Conclusions of Law entered herein on the 13th day of January, 1964, and having been duly considered, it is, by the Court, this 13th day of January, 1964,

ORDERED that judgment be, and the same hereby is, entered herein in favor of the defendant, Godfrey P. Schmidt, against the plaintiff, Lawrence T. Smith, with costs.

/s/ Edward A. Tamm
Judge

[Certificate of Service]

[Filed March 24, 1964]

MOTION FOR JUDGMENT AGAINST GLENS FALLS INSURANCE COMPANY

Comes now the defendant, Godfrey P. Schmidt, by and through his attorney, Cornelius H. Doherty, and moves the Court to enter judgment against the Glens Falls Insurance Company, a Corporation, and Lawrence T. Smith, for costs and damages sustained by reason of the wrongful suing

out of an attachment before judgment, and, in support of the said motion, submits the following:

1. On January 9, 1961, the plaintiff, Lawrence T. Smith, filed an attachment before judgment in the sum of $12,598.26, with interest from June 30, 1959, attaching monies due the defendant, Godfrey P. Schmidt, in the hands of the International Brotherhood of Teamsters, and filed a bond in accordance with Title 16, Section 301 of the 1961 District of Columbia Code, with Glens Falls Insurance Company, surety, in the full sum of $25,196.52.

2. The garnishee, International Brotherhood of Teamsters, filed its answer admitting the attachment of the sum of $12,598.96, and that it was holding the funds of the defendant in that sum, subject to the further order of the Court, which said monies have been held by the garnishee from January 9, 1961, to the present time, and defendant claims interest thereon from January 9, 1961, to date at 6% per annum, or $2267.81

3. By reason of his financial condition, the defendant was unable to obtain a release of the amount of the funds held subject to the attachment, and thereafter a lien was placed thereon by the Internal Revenue Service which is still in force and effect.

4. That the defendant is, and was, on January 9, 1961, a practicing attorney in the City of New York where he resided and in order to defend the action filed by the plaintiff herein it was necessary that he obtain the services of a local attorney at an agreed fee of $3500.00; it was necessary also to make six round trips between New York and the District of Columbia, at a cost of $192.00, and local Court costs have been assessed in the sum of $93.00 against the plaintiff, making a total of $3885.24.

5. That on January 13, 1964, after a trial on the merits, judgment was entered in favor of the defendant, Godfrey P. Schmidt, and no motion for a new trial have been filed and no appeal taken therefrom the judgment in favor of the defendant is final.

WHEREFORE, the defendant, Godfrey P. Schmidt, demands judgment against the plaintiff, Lawrence T. Smith, and his surety, Glens Falls Insurance Company, a Corporation, for the damages sustained by the unlawful attachment, in the sum of $6153.05.

/s/ Cornelius H. Doherty

1010 Vermont Avenue, N.W.
Washington, D.C.
Attorney for Godfrey P. Schmidt

I certify that a copy of the foregoing Motion and Memorandum in Support Thereof was this 24th day of March, 1964, mailed to Seymour J. Spelman, Esquire, 1111 19th Street, North, Arlington, Virginia, and Glens Falls Insurance Company, 1005 Bonifant Street, Silver Spring, Maryland.

/s/ Cornelius H. Doherty

To: The Clerk

Please forward a copy of the foregoing motion to Glens Falls Insurance Company, 1005 Bonifant Street, Silver Spring, Maryland, in accordance with Rule 73(f) of the Federal Rules of Civil Procedure.

/s/ Cornelius H. Doherty

[Filed March 31, 1964]

MOTION TO DISMISS MOTION FOR JUDGMENT

Comes now plaintiff, Lawrence T. Smith, and moves to dismiss defendant's motion for judgment filed herein and as grounds therefor states as follows:

1. Defendant's motion is an action for damages for wrongful attachment and, as such, constitutes an independent action which should be brought as an independent suit.

2. Defendant relies upon Rule 73(f), F. R. Civ. P. as authority for proceeding by way of motion in lieu of an independent suit. (Defendant's Motion, p. 3). Rule 73(f) governs only suits on "appeal or supercedeas bond" and has no application to attachment bonds in the trial court.

3. Defendant's motion for judgment fails to state a claim on which relief can be granted in that it does not allege facts to show that the attachment was wrongful or unlawful. Defendant bases his claim on the fact that plaintiff's suit was unsuccessful. That fact, standing alone, does not establish the wrongfulness of the attachment.

Wherefore, plaintiff prays that defendant's motion for judgment be dismissed.

March 30, 1964

/s/ Seymour J. Spelman
Attorney for Plaintiff

[Certificate of Service]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS MOTION FOR JUDGMENT

1. Rule 12(b), F. R. Civ. P.
2. Rule 73(f), F. R. Civ. P.

/s/ Seymour J. Spelman

[Filed April 1, 1964]

OPPOSITION TO MOTION FOR JUDGMENT AGAINST GLENS FALLS INSURANCE COMPANY

The defendant herein, Godfrey P. Schmidt, has filed a motion for judgment against Glens Falls Insurance Company as surety on an attachment before judgment bond filed by the plaintiff herein, Lawrence T. Smith The case involved a breach of contract action and the Court entered judgment in favor of the defendant. In his motion for judgment, the defendant herein alleges the attachment before judgment was wrongful and demands judgment for damages against the plaintiff and Glens Falls, as surety, in the amount of $6,153.05..

By letter dated March 24, 1964, the Clerk advised Glens Falls that the motion for judgment and memorandum in support was on that date served on the Clerk pursuant to Rule 73(f) of the Federal Rules of Civil Procedure and, accordingly, a copy of the motion and memorandum was being forwarded pursuant to that Rule (see copy of Clerk's letter attached as Exhibit A).

The motion for judgment should be dismissed for two reasons (a) Defendant Schmidt cannot properly proceed against Glens Falls by motion for judgment and (b) the motion for judgment has not been served on Glens Falls as a matter of law since Rule 73(f) of the Federal Rules, under which Defendant Schmidt is proceeding, has no application here.

The statute governing attachments before judgment makes no provision for a defendant to proceed by way of a motion for judgment to recover for an alleged wrongful attachment (16 D.C. Code (1961 Ed.) 301). In the absence of such authority defendant must institute a separate proceeding by filing a complaint (see memorandum in support accompanying this motion). To illustrate, movant is erroneously alleging as damages the sum of $3,885.24 for counsel fees and expenses incurred in the defense of the

breach of contract litigation. Clearly, this is not recoverable as damages arising out of the attachment which took place in that litigation. He is also claiming interest which is unjustifiable. This demonstrates further that a motion for judgment is an improper procedure and that we are entitled to an independent proceeding so as to have full opportunity to develop and show that the damage claims are without merit (see memorandum of law attached).

Secondly, there has been no valid service on Glens Falls by defendant Schmidt since a copy of his motion was simply mailed to Glens Falls by the Clerk of this Court pursuant to Rule 73 (f) of the Federal Rules of Civil Procedure. This Rule has no application here as it provides for service by the Clerk only where appeal or supersedeas bonds are involved and this case involves attachment bond only.

Accordingly, the motion for judgment herein should be dismissed or, alternatively, it should be denied.

/s/ Edward Gallagher

/s/ George R. Gallagher

Attorneys for Glens Falls Insurance Co.
500 Federal Bar Building
Washington 6, D. C.

[Certificate of Service]

[Filed May 12, 1964]

MEMORANDUM AND ORDER

Plaintiff, Lawrence T. Smith, has moved the court to dismiss defendant's motion for judgment against Glens Falls Insurance Company.

The complaint sought damages for breach of an employment contract, and plaintiff obtained an attachment before judgment. Defendant Schmidt prevailed at trial on the merits and then filed a motion for judgment for costs and damages sustained as a result of the wrongful suing out of an attachment before judgment. This motion is against the plaintiff, Smith, and the surety, Glens Falls.

This court will grant plaintiff's motion to dismiss, without prejudice to defendant Schmidt to renew his claim in an independent action.

Defendant Schmidt obtained service on his motion on the surety under authority of Rule 73(f) of the Federal Rules of Civil Procedure. This rule applies to appeal bonds and supersedeas bonds, and further provides that the liability of the surety may be enforced on motion without the necessity of an independent action. This rule does not cover the extraordinary bond for attachment before judgment. Title 16, sec. 301, of the D.C. Code is the statutory authority for attachment before judgment and no such remedy on motion is provided therein.

Tri-State Motor Corp. v. Standard Steel Car Co., 276 F. 631, 51 App. D.C. 109 (1922), pointed out that there is no conflict between Section 16-301 on attachment bonds and Section 28-2403, which is the general section for fiduciary's bonds. The Court, at 51 App. D.C. 109, 111, held that "section 479(a) [the predecessor statute to section 28-2403], being a general statute, does not provide for bonds in attachment proceedings, ---- that subject is governed by section 445 [now 16-301]."

In addition, the defendant Schmidt may not necessarily be entitled to the full amount of the bond. In Davis v. Peerless Insurance Co., 255 F.2d 534 (1958), the court pointed out, at page 538:

> " . . . He is limited to, and the surety is bound only to pay, such costs and damages as Davis can show were sustained because of the detention of his property."

Accordingly, in accordance with the above, it is this 11th day of May, 1964,

ORDERED, that Plaintiff's motion to dismiss defendant's motion be, and the same hereby is, granted; and defendant Schmidt's motion for judgment is hereby dismissed without prejudice to defendant to file and independent action.

/s/ Leonard P. Walsh, Judge

COPIES TO:

Seymour J. Spelman, Esq., 1111 - 19th Street, North, Arlington, Virginia, Attorney for Plaintiff

Cornelius H. Doherty, Esq., 1010 Vermont Avenue, Washington, D. C. - Attorney for Defendant Schmidt

Edward Gallagher and George Gallagher, Esquires, 500 Federal Bar Building, Attorneys for Glens Falls Insurance Co.

[Filed May 13, 1964]

MOTION TO CORRECT MEMORANDUM AND ORDER

To:

Seymour J. Spelman, Esquire
1111 19th Street, North
Arlington, Virginia

Edward Gallagher, Esquire
George Gallagher, Esquire
500 Federal Building
Washington, D. C.

Please take notice than on Monday, May 18, 1964, at 10:00 A.M., as a preliminary matter, I will make an oral motion, before Honorable Leonard P. Walsh, Judge, to amend the memorandum and order filed in the above entitled matter.

/s/ Cornelius H. Doherty
1010 Vermont Avenue, N.W.
Washington, D. C.
Attorney for Godfrey P. Schmidt

[Certificate of Service]

[Filed May 25, 1964]

ORDER DISMISSING MOTION FOR JUDGMENT

This cause came on for hearing on the motion of the plaintiff, Lawrence T. Smith, to dismiss the motion for judgment filed herein by the defendant, Godfrey P. Schmidt, the opposition to the motion for judgment against Glens Falls Insurance Company, the memorandum of the defendant, Godfrey P. Schmidt, in opposition to both motions, and having been fully argued and considered and upon the memorandum filed herein, it is, by the Court, this 23rd day of May, 1964,

ORDERED that the said motions be, and they are hereby, granted, and the motion of the defendant, Godfrey P. Schmidt, is dismissed, and it is further

ORDERED that the dismissal of the defendant's motion for judgment is without prejudice to his right to renew his claim in an independent action.

/s/ Leonard P. Walsh
Judge

[Certificate of Service]

[Filed May 27, 1964]

NOTICE OF APPEAL

Notice is hereby given this 27th day of May, 1964, that Godfrey P. Schmidt, the above named defendant, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of the Court entered on the 25th day of May, 1964, in favor of the plaintiff, Lawrence T. Smith, and Glens Falls Insurance Company, a Corporation, against said Godfrey P. Schmidt in dismissing his motion for judgment

/s/ Cornelius H. Doherty

1010 Vermont Avenue, N.W.
Washington, D. C.
Attorney for Godfrey P. Schmidt

Copies to be sent to:

Seymour J. Spelman, Esquire
1111 19th Street, North
Arlington, Virginia

Edward Gallagher, Esquire
500 Federal Building
Washington, D. C.

George Gallagher, Esquire
500 Federal Building
Washington, D. C.

[Filed June 1, 1964]

ORDER FOR TRANSMITTAL OF ORIGINAL RECORD FORTHWITH

Upon motion of Counsel, and good cause having been shown, it is, by the Court, this 1st day of June, 1964,

ORDERED that the Clerk be, and he hereby is, authorized to transmit to the United States Court of Appeals for the District of Columbia Circuit, the entire original file forthwith.

Judge

BRIEF FOR APPELLEES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,664

GODFREY P. SCHMIDT, *Appellant*,

v.

LAWRENCE T. SMITH, GLENS FALLS INSURANCE COMPANY,
Appellees.

Appeal From the United States District Court for the District of Columbia

EDWARD GALLAGHER
GEORGE R. GALLAGHER
500 Federal Bar Building
1815 H Street, Northwest
Washington 6, D. C.
Attorneys for Appellees

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

QUESTION PRESENTED

In the opinion of appellees, the question presented is whether the court below ruled correctly that, there being no statutory authority, an attachment defendant cannot proceed on the attachment bond to recover damages from the attachment by way of a motion for judgment in the principle proceeding but, rather, must proceed by suing on the bond in an independent proceeding.

INDEX

TABLE OF AUTHORITIES

Cases:

Rules and Statutes:

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,664

GODFREY P. SCHMIDT, *Appellant,*

v.

LAWRENCE T. SMITH, GLENS FALLS INSURANCE COMPANY, *Appellees.*

Appeal From the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES

STATUTES INVOLVED

D. C. Code, 28-2401 (1961 Edition)

"A bond, when required or referred to, in the provisions of this code, shall be understood to signify an obligation in a certain sum or penalty, subject to a condition, on breach of which it is to become absolute and to be enforceable by action. (Mar. 3, 1901, 31 Stat. 1264, ch. 854, § 478.)

D. C. Code 16-301 (1961 Edition)

> " * * * * *Provided,* That the plaintiff shall first file in the clerk's office a bond, executed by himself or his agent, with security to be approved by the clerk, in twice the amount of his claim, conditioned to make good to the defendant all costs and damages which he may sustain by reason of the wrongful suing out of the attachment."

SUMMARY OF ARGUMENT

In order to sue for damages on an attachment bond, the attachment bond defendant must file a complaint in an independent proceeding rather than a motion for judgment in the principal proceeding.

Section 301 of Title 16, D. C. Code (1961 Ed.) relates exclusively to attachment bonds. Unlike in 28-2403 of the D. C. Code, which relates to fiduciary bonds, Congress did not provide for a remedy by way of a motion for judgment in the principal proceeding to recover damages on the attachment bond. Having done so with fiduciary bonds it would have done so with attachment bonds if it had so intended. The attachment bond statute was amended in 1963 and still permits no such remedy.

In *Davis* v. *Peerless Insurance Company, infra,* this Court, in effect, pointed out that the proper procedure to recover damages under an attachment bond is by way of an independent action; and that the attachment bond statute is not to be confused with the fiduciary bond statute. In *Tri-State Motor Corp.* v. *Standard Steel Car Co., infra,* this Court held that the fiduciary bond statute does not provide for bonds in attachment proceedings.

It places no undue hardship upon appellant to compel him to proceed in this customary fashion. Contrary to appellant, there is no real problem on service present here since the appellee surety is clearly subject to service in this jurisdiction. Since there is no statutory authority to proceed by way of a motion for judgment in the principal

proceeding, appellant is left to the usual remedy of an independent action on the bond.

ARGUMENT

The Trial Court Properly Dismissed Without Prejudice Appellant's Motion for Judgment

In the Court below, appellant filed a motion for judgment against appellees Lawrence T. Smith and Glens Falls Insurance Company (as surety), alleging that an attachment before judgment was wrongful and demanding judgment for damages in the amount of $6,153.05. Appellant erroneously served his motion on appellee Glens Falls Insurance Company under authority of Rule 73 (f) of the Federal Rules of Civil Procedure (J.A. 13). This Rule applies only to appeal and supersedeas bonds, and not attachment bonds, and therefore appellant did not effect service of his motion properly on appellee Glens Falls Insurance Company.

The Court below dismissed the motion for judgment, ruling that since there was no statutory provision authorizing a procedure by way of motion for judgment in attachment bond proceedings appellant must proceed by way of a complaint in an independent proceeding.

The thrust of appellant's argument appears to be that Sections 2402 and 2403 of Title 28, District of Columbia Code (1961 Ed.) contain authority for proceeding by way of a motion for judgment to recover damages allegedly arising out of a wrongful attachment before judgment (Br. 6-7). The Court below ruled, however, that those Sections do not cover attachment bond proceedings, citing *Tri-State Motor Corporation* v. *Standard Steel Car Company,* 276 F. 631, 51 App. D.C., 109; that Section 2403 is the general section for fiduciary bonds; that attachment proceedings are governed exclusively by 16-301* of the District of

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* This section is now 16-501 in Supplement III of the Code, recently published.

Columbia Code (1961 Ed.); that 16-301 contains no remedy of motion for judgment; and that, therefore, appellant must proceed by way of an independent action.

Appellant contends, however, that Sections 2402 and 2403 of Title 28 cover the procedure in actions on all bonds; and that these statutes provide for moving for judgment in the same proceeding to recover damages on any bond (Br. 6).

This is incorrect. Section 2402 relates to undertakings generally; and Section 2403 relates to fiduciary bonds and does not relate to attachment bonds. As to the latter, this Court has so held. *Davis* v. *Peerless Insurance Company,* 103 U.S. App. D.C. 125, fn. 5 at P. 127, 255 F. 2d 534, fn. 5 at P. 536; *Tri-State Motor Corporation* v. *Standard Steel Car Company,* 51 App. D.C. 109, 276 F. 631.

In *Davis,* there was brought an independent action on an attachment bond. While appellant cites *Davis* for a different purpose (P. 7), it is interesting to note that there this Court referred to 28-401 of the D. C. Code (1951) wherein it provides bonds are "enforceable by action" and then stated, "This action properly rests upon that section" (103 U.S. App. D.C. at P. 128, 255 F. 2d at P. 537). In other words, in *Davis,* unlike here, the proper procedure was followed in that an independent action was commenced to recover on the bond and this Court stated this was the procedure to be followed.

There is an exclusive statute for attachment bonds (16-301 D.C. Code, 1961 Ed.) and it does not provide a remedy by way of a motion for judgment. Incidentally, this statute was amended in 1963 and still provides for no such remedy. In the absence of such authority, appellant must proceed in the usual way by a complaint in an independent action. As stated, this is the course approved by this Court in *Davis, supra*; see, also, 5 Am. Jur. pp. 216-218.

Congress provided the remedy of a procedure by way of a motion for judgment in the principal proceeding in the fiduciary bond statute (28-2403) but did not do so in the attachment statute (16-301). The necessary conclusion is that having done so on fiduciary bonds it would have done so on attachment bonds if it intended such a procedure as to the latter. This Court stated in *Davis, supra,* "Attachment bonds are not to be confused with those coming within D. C. Code, Section 2403 (1951)." 103 U.S. App. D.C. at 127, fn. 5, 255 F. 2nd at 536, fn. 5. In so stating, this Court was affirming its prior holding in *Tri-State, supra,* where it stated that " * * * we hold that section 479a [now 28-2403] being a general statute, does not provide for bonds in attachment proceedings—that subject is covered by Section 445 [now 16-501]." 51 App. D.C. at 111, 276 F. at 633.

There is no hardship on appellant to require him to proceed in the usual course. In addition, an independent action affords us the normal procedural safeguards, viz., discovery, etc. To illustrate, appellant is claiming as damages an item of $3,885.24 for legal fees and expenses incurred in defending the principle suit, i.e., the contract action in which the attachment occurred (J.A. 9). This is clearly not recoverable since it did not arise out of the attachment. *Java Coconut Oil Co.* v. *Fidelity and Deposit Company of Maryland,* 300 F. 302. But more particularly, the interest item of $2,267.81 (J.A. 9) is subject to attack in large part and this can be established in the discovery process.

Appellant speculates that he may be put to a hardship to obtain service on appellee Smith (Br. 7) and that he must, therefore, proceed by way of a motion for judgment in order to obtain satisfaction (Br. 7-8). The answer is that appellee Glens Falls Insurance Company, the surety, is clearly subject to process in this jurisdiction, even if it were correct to conclude that he might have difficulty in

obtaining service of process on appellee Smith. This being so, his statement has no merit.

CONCLUSION

It is respectfully submitted that the Court below correctly dismissed appellant's motion for judgment without prejudice to the filing of an independent action to recover on the bond for damages.

Respectfully submitted,

EDWARD GALLAGHER

GEORGE R. GALLAGHER
500 Federal Bar Building
1815 H Street, Northwest
Washington 6, D. C.
Attorneys for Appellees

August, 1964